No. 13684

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

ASSOCIATED HOTELS (HAWAII), LTD., a Corporation, d.b.a. NIUMALU HOTEL,

Appellee.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 48)

Appeal from the United States District Court for the District of Hawaii.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-15-53

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

For the Plaintiff, United States of America,

A. WILLIAM BARLOW, ESQ.,
United States District Attorney,
Federal Building,
Honolulu, T. H.

and

B. A. PERHAM, JR., ESQ.,
Special Assistant United States Attorney,
1330 So. Beretania St.,
Honolulu, T. H.

For the Defendant, Associated Hotels (Hawaii), Ltd., a Corporation dba Niumalu Hotel,

SMITH, WILD, BEEBE & CADES,
Bishop Trust Building,
Honolulu, T. H.

In the United States District Court
for the District of Hawaii

Civil Action, File Number 1138

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ASSOCIATED HOTELS (HAWAII), LTD., a Corporation d.b.a. NIUMALU HOTEL,
Defendant.

COMPLAINT

The United States of America brings this suit against the defendant named above and alleges:

I.

This is a civil action brought to recover damages for violations by defendant of a price stabilization regulation issued pursuant to the Defense Production Act of 1950, as amended (Public Law 69, 82d Congress, 64 Stat. 798; Public Law 96, 82d Congress). Jurisdiction of the suit is vested in this Court by Section 706(b) of the Defense Production Act of 1950, as amended, and also by Section 1345, Title 28, United States Code.

II.

Section 409(c) of the Defense Production Act of 1950 supra, provides in pertinent part as follows:

> "If any person selling any material or service violates a regulation or order prescribing a ceiling or ceilings, the person who buys such material or service for use or consumption

other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In any action under this subsection, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is greater: (1) such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50 as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges if the defendant proves that the violation of the regulation or order in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the word 'overcharge' shall mean the amount by which the consideration exceeds the applicable ceiling. If any person selling any material or service violates a regulation or order prescribing a ceiling or ceilings and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the President may institute such action on behalf of the United States within such

one-year period, or compromise with the seller the liability which might be assessed against the seller in such an action."

III.

Defendant is a corporation organized under the laws of the Territory of Hawaii, and is engaged in the business of selling beverages, including alcoholic liquors at retail as a bar and as a caberet operator, and which aforementioned beverages are sold and served for consumption on and about the premises of the defendant's place of business, located at 2005 Kalia Road, Honolulu, T. H., and which place of business is within the territorial limits of the jurisdiction of this Court.

IV.

Acting pursuant to the Defense Production Act of 1950, as amended, Executive Order 10161 (15 Federal Register 6105), and Economic Stabilization Agency General Order No. 2 (16 Federal Register 738), the Director of Price Stabilization issued, on March 13, 1951, a price stabilization regulation, to wit: Ceiling Price Regulation 11 (16 Federal Register 2391), hereinafter referred to as "the Regulation." The Regulation became effective April 1, 1951, and as it pertains to all times and periods referred to in this Complaint it has been from its effective date and still is, in full force and effect.

V.

From April 1, 1951, to January 18, 1952, defendant has sold and delivered alcoholic liquors and

beverages in the manner set forth in Paragraph III, above, the maximum prices for which were established by the aforesaid Regulation.

VI.

The said Regulation in Section 3 thereof prescribes the method for determining the maximum prices for beverages served for consumption on or about the premises, including those sold by the defendant as alleged herein; and, in Section 2(c) thereof, prohibits the sale thereof at prices in excess of the applicable maximum prices under the Regulation.

VII.

a. Between the dates of April 1 through November 30, 1951, the defendant has sold and delivered the aforesaid alcoholic liquors and beverages at prices in excess of the applicable maximum prices under said Regulation to the extent and in the amount of, and not less than, $11,707.30, which amount is in excess of and exceeds the maximum prices established and allowed under said Regulation.

b. The violations by the defendant, of the applicable maximum prices under said Regulation as set forth herein, were willful and the result of failure to take practicable precautions against the occurrence of the said violations.

c. All the transactions complained of herein occurred within one year of the filing of the Complaint in this case.

d. All of the transactions complained of herein were other than in the course of purchaser's trade

or business and thirty days have transpired since the occurrence of the aforementioned violations without any suit for damages having been filed by any purchaser who was in any way connected with the aforesaid violations of the Regulation.

e. None of the transactions complained of arose because defendant acted upon and in accordance with the written advice and instructions of the President of the United States or any official or employee authorized to act for him.

f. None of the transactions complained of arose out of the sale of any material or service, to any agency of the Government, pursuant to the lowest bid made in response to an invitation for competitive bids.

Wherefore, plaintiff prays judgment against defendant in a sum equal to three times the amount by which the prices charged and received for the aforementioned alcoholic liquors and beverages exceeded the applicable maximum prices therefor, to wit: in the amount of not less than $35,121.90, together with reasonable attorney's fees and costs.

Dated at Honolulu, T. H., this 27th day of March, 1952.

HOWARD K. HODDICK,
Acting United States Attorney
in the District of Hawaii.

By /s/ BENJAMIN A. PERHAM, JR.,
Special Assistant United
States Attorney.

[Endorsed]: Filed March 27, 1952.

[Title of District Court and Cause.]

MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

Comes now Associated Hotels (Hawaii), Ltd., defendant in the above-entitled action, by its attorneys, Smith, Wild, Beebe & Cades, and pursuant to Rules 12 and 56 of the Federal Rules of Civil Procedure, respectfully moves this Honorable Court as follows:

I.

That the Court dismiss the action on the ground that the complaint fails to state a claim against the defendant above named upon which relief can be granted.

II.

That the Court, pursuant to Rule 56, issue a summary judgment in favor of the defendant, dismissing the action as to it on the ground that there is no substantial issue of any material fact relevant to the asserted claim against said defendant, and said defendant is entitled to judgment as a matter of law.

This motion is based upon the record and the affidavit of John K. Spencer attached hereto as Exhibit "A," and the Memorandum of Authorities filed herewith.

Dated: Honolulu, T. H., April 18, 1952.

ASSOCIATED HOTELS
(HAWAII), LTD.,

By SMITH, WILD, BEEBE &
CADES,
Its Attorneys.

By /s/ MILTON CADES.

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

To: Howard K. Hoddick, Acting United States Attorney, and
B. A. Perham, Jr., Special Assistant United States Attorney, Attorneys for Plaintiff:

Please Take Notice Hereby Given that on Thursday, the 24th day of April, 1952, at the hour of 10 a.m., or as soon thereafter as counsel can be heard, in the courtroom of the Honorable Delbert E. Metzger, District Judge, in the Post Office and Court House Building in the City of Honolulu, Territory of Hawaii, Associated Hotels (Hawaii), Ltd., defendant herein, will bring on for hearing the following motions, and will move the Court as follows:

I.

To dismiss the action on the ground that the complaint fails to state a claim against the defendant above named upon which relief can be granted.

II.

That the Court issue, pursuant to Rule 56, a summary judgment in favor of the defendant, dismissing the action as to it on the ground that there is no substantial issue of any material fact relevant to the asserted claim against said defendant, and said defendant is entitled to judgment as a matter of law.

These motions are based upon the record, the affidavit of John K. Spencer attached hereto as Exhibit "A," and the Memorandum of Authorities filed herewith.

Dated: Honolulu, T. H., April 18, 1952.

SMITH, WILD, BEEBE & CADES,
Attorneys for Associated Hotels (Hawaii), Ltd.

By /s/ MILTON CADES.

EXHIBIT "A"

In the United States District Court
for the District of Hawaii

Civil Action File Number 1138

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ASSOCIATED HOTELS (HAWAII) LTD., a Corporation d.b.a. NIUMALU HOTEL,
Defendant.

AFFIDAVIT OF JOHN K. SPENCER

Territory of Hawaii,
City and County of Honolulu—ss.

John K. Spencer, being first duly sworn, on oath deposes and says:

I am Vice President of Associated Hotels (Hawaii), Ltd., and the Manager of the Niumalu Hotel, which is operated by Associated Hotels (Hawaii), Ltd., and located at 2005 Kalia Road, Honolulu, T. H. I have occupied such office and position since July, 1950. In the performance of my functions in such office and position I have closely supervised the operation of the Niumalu Hotel and am familiar with the financial books and records of the business and corporation and the way they are and have been maintained.

Prior to the effective date of Ceiling Price Regulation 11 of the Office of Price Stabilization the price records of the hotel were not kept in the manner required by Ceiling Price Regulation 11 or in a manner readily adaptable to the method of control provided by that regulation; that the concept cost per dollar of sales forming the basis of Ceiling Price Regulation 11 was a new concept to the business as carried on by the Niumalu Hotel.

I am informed and believe and therefore state that compliance was had by the Niumalu Hotel and the Associated Hotels (Hawaii), Ltd., with the require-

ments of Ceiling Price Regulation 11 to the fullest extent possible.

Further this affiant sayeth not.

Dated: Honolulu, T. H., April 17th, 1952.

/s/ JOHN K. SPENCER.

Subscribed and sworn to before me this 17th day of April, 1952.

[Seal] /s/ FRIEDA H. ROBERT,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires 6-30-53.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 18, 1952.

[Title of District Court and Cause.]

MORE DEFINITE STATEMENT AND BILL OF PARTICULARS

Pursuant to defendant's oral motion for a More Definite Statement or a Bill of Particulars, in the above-entitled case, the Plaintiff hereby states that it determined the overcharges as referred to in paragraph VII in its Complaint, and the amount of said overcharges from the books and records of the Defendant Corporation, together with defendant's filing of April 30, 1951, attached hereto as Exhibit "A."

The books and records of the Defendant Corporation reveal that the total cost of beverages sold during the four months period from April 1, 1951, to July 31, 1951, was $14,103.89, and the amount which said beverages were sold for was $61,661.99, which makes the ratio of said cost to said sales .2287.

$14,103.89 ÷ .2433 (Defendant's base period ratio as set forth in Exhibit "A," attached hereto.) =$57,969.13

$61,661.99 — $57,969.13 = $3,692.86, which is the amount of Defendant's overcharge for the period from April 1, 1951, to July 31, 1951.

The books and records of the defendant corporation reveal that the total cost of beverages sold during the four months period from August 1, 1951, to November 30, 1951, was $13, 544.57, and the amount which said beverages were sold for was $63,684.68 which makes the ratio of said cost to said sales .2127. The defendant's base period liquor cost ratio was .2433 (See Exhibit "A" attached).

$13,544.57 ÷ .2433=$55,670.24.

$63,684.68—$55,670.24=$8,014.44, as the amount of the overcharge for the period of August 1, 1951, to November 30, 1951.

$3,692.86 + $8,014.44 = $11,707.30 (The amount of defendant's overcharge for the aforesaid two four-months compliance periods.)

In that the violation of the Ceiling Price Regulation 11 was willful or the result of failure to take practicable precautions against said violations as set forth in Section 409(c) of the Defense Production Act of 1950, the Plaintiff asks for three times the amount of said overcharges, to wit: the amount of $35,121.90, together with reasonable attorney's fees and costs.

Dated: Honolulu, T. H., May 12th, 1952.

HOWARD K. HODDICK,
Acting United States Attorney
in the District of Hawaii.

By /s/ B. A. PERHAM, JR.
Special Assistant United
States Attorney.

EXHIBIT "A"

Report for the Office of Price Stabilization
(This Form Designed by the American Hotel Association)

Statement Required Under Ceiling Price Regulation 11, Section 4
(To Be Filed With District Office of Price Stabilization on or Before April 30, 1951)

A. Name and Address of Hotel, Restaurant, etc: Associated Hotels (Hawaii), Ltd., dba Niumalu Hotel, 2005 Kalia Road, Honolulu.

Name and Address of Operator:

B. (1) Base Period Elected (check one): 12 months ended Dec. 31, 1949 ☒
12 months ended June 30, 1950 ☐
Resort Operator ☐

If you do not operate the year around, state months comprising base period on line below:

(2) Cost per dollar of sales will be computed on the following basis (check one):
Annual ☒ Monthly ☐

C. Gross Sales and Cost (if on annual basis, give annual total only; if on monthly basis, give monthly amounts):

	Food (Food Only if Filed Separately) or (Total Food & Beverages if Beverages are not separated)		Cost per Dollar of Sales (Col. #2 divided by Col. #1)	Alcoholic Beverages (Includes mixes, etc. generally identified with bar sales)		Cost per Dollar of Sales (Col. #5 divided by Col. #4)
	#1 Sales	#2 Cost	#3	#4 Sales	#5 Cost	#6
Annual Totals:	$.....	$.....	.....%	$97,779.64	$23,791.23	24.33%
Monthly Totals:	$.....	$.....	.....%	$.....	$.....	.....%
	.....	.....	.....	.....	.....	.....
	.....	.....	.....	.....	.....	.....
	.....	.....	.....	.....	.....	.....
	.....	.....	.....	.....	.....	.....
	.....	.....	.....	.....	.....	.....

D. If items other than food or beverage costs have been included in above table (such as ice, straws, paper napkins, etc.) List such items below:
Food Cost (names of items)
Beverage Cost (names of items)

E. Special charges in effect during your base period or during January 16, 1951, thorugh January 25, 1951. If cover or minimum charges varied with type of entertainment, explain:

☐ Cover	$.....	☐ Corkage	$.....
☐ Minimum	$.....	☐ Entertainment	$.....
☐ Bread-and-Butter	$.....	☐ Checking	$.....
☐ Service	$.....	☐ Parking	$.....

☐ Other Special Charges—List Below:

Date: April 30, 1951.

ASSOCIATED HOTELS (HAWAII), LTD., dba NIUMALU HOTEL

/s/ John K. Spencer,
(Official position) Vice President.

Certified true copy.
B. A. PERHAM, JR.

[Endorsed]: Filed May 12, 1952.

[Title of District Court and Cause.]

ANSWER

Comes now Associated Hotels (Hawaii), Ltd. defendant hereinabove named, by its attorneys, Smith, Wild, Beebe & Cades, and for answer to the Complaint herein alleges:

I.

Answering the allegations contained in paragraph numbered I of the Complaint defendant denies that the Price Stabilization Regulation, a violation of which is alleged, was issued pursuant to the Defense Production Act of 1950, and further denies that this Court has jurisdiction of this action under the statutes set forth in paragraph numbered I.

II.

Answering the allegations contained in paragraph numbered II of the Complaint, to the extent that allegations are therein set forth, defendant admits the same.

III.

Answering the allegations contained in paragraph numbered III of the Complaint defendant admits the same.

IV.

Answering the allegations contained in paragraph numbered IV of the Complaint defendant denies that Ceiling Price Regulation 11 was issued in pursuance to the Defense Production Act of 1950 and further denies that said regulation is now or was at any time in legal force and effect.

V.

Answering the allegations contained in paragraph numbered V of the Complaint defendant denies that the maximum prices for alcoholic liquors and beverages sold by defendant from April 1, 1951, to January 18, 1952, were established by Ceiling Price Regulation 11.

VI.

Answering the allegations contained in paragraph numbered VI of the Complaint defendant denies the same.

VII.

Answering the allegations contained in paragraph numbered VII of the Complaint defendant admits the allegations contained in subparagraphs (c), (e) and (f), denies the allegations contained in subparagraphs (a) and (b), and is without information sufficient to form a belief as to the allegations contained in subparagraph (d) and therefore denies the same.

VIII.

Any and all allegations contained in said Complaint not expressly admitted or denied herein are denied.

First Affirmative Defense

That any failure by the defendant to comply with the requirements of Ceiling Price Regulation 11 between the period April 1, 1951, to November 30, 1951, cannot now be subject to any action by or on behalf of the United States because of the supersession of said CPR 11 by CPR 134, effective April 7, 1952.

Second Affirmative Defense

That any violation of CPR 11 by the defendant during the period April 1, 1951, through November 30, 1951, cannot be the subject of suit in this Court by virtue of the language of the superseding regulation (CPR 120) wherein it is found that CPR 11 was unsuitable as a technique of price control, too involved for territorial restaurants and generally difficult, and in many instances impossible of compliance; that by virtue of said determination said CPR 11 has now no legal validity and the supersession of the same in this manner operated to nullify its existence from April 1, 1951.

Third Affirmative Defense

That any violation of CPR 11 by the defendant during the period April 1, 1951, through November 30, 1951, cannot now be the subject of suit by and in behalf of the United States under Section 409(c) of the Defense Production Act because of the failure of said regulation to comply with the provisions of Section 402(g) of the Defense Production Act, in that said CPR 11 fails to contain any affirmative finding by the President that the changes in business practices, cost practices or methods found by the Director to result from CPR 11 were necessary to prevent circumvention or evasion of the regulation as required by said Section 402(g) of the Defense Production Act.

Fourth Affirmative Defense

That any violation of CPR 11 by the defendant during the period April 1, 1951, through November

30, 1951, is not subject to suit by the United States in the manner herein set forth but that by Section 409(c) of the Defense Production Act any such action is required to be instituted by the President of the United States on behalf of the United States and that the United States is an improper party in this action in the form in which it is set forth.

Fifth Affirmative Defense

During the period April 1, 1951, through November 30, 1951, the defendant, in the conduct of its business of selling, failed to violate CPR 11 in that it caused no beverage or other food products to be sold at prices in excess of those in effect during the period prior to the effective date of CPR 11 and to the extent that any violation of said regulation may have occurred during said period which said violation may be attributable to the defendant, said violation was not a willful violation by the defendant and was not as the result of a failure of the defendant to take practicable precautions against the occurence of such violation and therefore this Court, in compliance with Section 409(e) of the Defense Production Act of 1950, may award judgment against the defendant in an amount not in excess of the amount of the overcharge resulting from any such violation.

Sixth Affirmative Defense

That the Director of Price Stabilization has admitted and conceded in superseding CPR 11 by CPR 120 that CPR 11 was unsuitable as a method

of price control and impractical of compliance; that any violation of said CPR 11 by the defendant, set out as the basis of the plaintiff's action herein, was not a willful violation of said regulation and was not as a result of any failure by the defendant to take practicable precautions against the occurrence of such violation and therefore this Court, by Section 409(e) of the Defense Production Act, may award judgment against the defendant in any amount in excess of any actual overcharge that may be found by the Court to have occurred in violation of the regulation.

Seventh Affirmative Defense

That the Director of Price Stabilization has admitted and conceded in superseding CPR 11 by CPR 120 that CPR 11 was unsuitable as a method of price control and impractical of compliance; that said admission and concession by the Director of Price Stabilization is binding upon the plaintiff and that the plaintiff is now estopped to claim that any violation of said regulation by the defendant was willful or as a result of any failure by the defendant to take practicable precautions against the occurrence thereof and consequently the plaintiff is estopped to claim treble damages under Section 409(e) of the Defense Production Act for any such violation.

Eighth Affirmative Defense

Under the provisions of CPR 11, violation of which is claimed, no violation occurs when an item of food is sold at a price reflecting a lower food

cost per dollar of sale than was had during the base period set forth in said regulation, but rather such violation occurs only when the total gross sales for a four months' period reflect a lower food dollar per cost of sale than was had during the base period; that CPR 11 became effective on April 1, 1951, and that therefore no violation of said regulation was possible of occurrence prior to four months therefrom, or July 31, 1951, and that all sales made by defendant prior to said July 31, 1951, cannot as a matter of law be deemed to have been violative of CPR 11 or of the Defense Production Act.

Ninth Affirmative Defense

That Section 409 (c) of the Defense Production Act which provides for liability for the seller for overcharges, in violation of ceiling price regulations issued in compliance with the Act, specifies that any purchaser of materials or services for use or consumption other than in the course of trade or business may bring an action against a seller on account of an overcharge on such sale; that CPR 11, which was purportedly issued in compliance with the Defense Production Act, provides no ceiling price for individual commodities or sales but rather provides a ceiling price based only upon gross sales for a four months' period and the ratio between such sales to the food costs of the food so sold; that no action could be brought by a purchaser under this regulation for recovery of an overcharge on an individual sale because of the absence of such commodity or sale ceiling price; that the provision for

the institution of actions on behalf of the United States as set forth in said Section 409 (c) makes such actions on behalf of the United States identical with those in which an individual purchaser could proceed and in fact makes the United States a successor to said individual purchaser; that as successor to such individual purchasers the plaintiff can recover under Section 409 (c) of the Defense Production Act only for overcharges on individual sales to the extent that such sales prices were in excess of established ceiling prices for such sales; that no individual ceiling prices having been established by CPR 11, no recovery can be had by the plaintiff against the defendant herein.

Tenth Affirmative Defense

That by amendment to CPR 11 on July 27, 1951, effective August 1, 1951, being Amendment 4, provision is made for so-called "combination establishments," which establishments not only sell meals, food items or beverages but also sell other commodities, products or services; that by said Amendment 4 it is recognized that an inequity exists in the treatment of said combination establishments in the same manner as other restaurants; that despite this recognition of such inequity existing in CPR 11 said amendment fails to adequately provide for the same and therefore CPR 11, both prior to and after said amendment, fails to adequately establish workable regulations for the control of prices in the restaurant business of defendant and consequently

defendant cannot be found liable for violation of said regulation.

Eleventh Affirmative Defense

That CPR 11, which it is alleged the defendant has violated, does not provide for an individual ceiling price for each article of food; and is squarely in conflict with Section 402 (k) of said Act; that the regulation provides for the maintenance during the compliance period of a ratio or gross sales prices to gross food costs per dollar of sale established in the base period; that a restaurateur is not in violation of the regulation, irrespective of the ratio of his food costs to his sales price in any particular transaction, but is in violation only when at the end of any four months' period a comparison of his gross sales and food costs show a food cost per dollar of sales lower than that in effect during the base period; that at the end of such four months' period if the records show a food cost per dollar of sales lower than that in effect during the base period, the plaintiff improperly contends that each transaction during said period was in violation of the regulation, irrespective of the food cost per dollar of sale in each individual transaction; that the cause of action set forth by the plaintiff herein rests upon such contention; that the regulation, if applicable as so contended, results in a restaurateur, who sells various commodities which during the base period carried different food costs per dollar of sales, being in a position where he is unable to tell at any time during said compliance period

whether he is or is not in compliance but that such determination can only be made retroactively by said restaurateur and by the Director of Price Stabilization or his designated agents only at the conclusion of said four months' period; that this action as set out by the plaintiff claims violation during said four months' period as a result of a retroactive determination made at the conclusion of such periods in violation of the rights of the defendant guaranteed under the Constitution of the United States and particularly those contained in the Fifth Amendment thereto.

Twelfth Affirmative Defense

That the plaintiff through its pleadings and bill of particulars has in fact alleged that every sale made by the defendant during the period April 15, 1951, to November 30, 1951, was made in violation of CPR 11 and the Defense Production Act because allegedly the total costs of beverages and the total ceiling prices therefor during said period bore a ratio less than the ratio of cost to sales in the base period; that in fact the defendant is not liable under CPR 11 or under the Defense Production Act for any sales made during said compliance period where the prices charged by the defendant in such sales were not individually in excess of any established ceiling price, and in fact the liability of the defendant hereunder is strictly limited to the amount of the overcharge established to exist in any individual sale to the extent that such individual sale may have been at a price in excess of the ceiling established by said CPR 11.

Dated: Honolulu, T. H., this 19th day of May, 1952.

ASSOCIATED HOTELS
(HAWAII), LTD.

By SMITH, WILD, BEEBE &
CADES,
Its Attorneys.

By /s/ J. RUSSELL CADES.

By /s/ MILTON CADES.

Receipt of copy acknowledged.

[Endorsed]: Filed May 19, 1952.

[Title of District Court and Cause.]

MOTION FOR ENTRY OF JUDGMENT

Comes now the defendant above named and moves this Honorable Court that it enter judgment for the defendant at the close of the evidence offered by the plaintiff for the following reasons:

1. The plaintiff has failed to prove that any maximum prices were established by the regulation referred to in the complaint.

2. The plaintiff has failed to prove the sale by the defendant of materials in excess of maximum prices.

3. It affirmatively appears that CPR 11 was superseded because it was an unsuitable regulation and that it was impossible for the defendant to

comply therewith, or in the alternative, if it was compelled to comply therewith, such compulsion would violate the Defense Production Act of 1950, and the Constitutional rights of the defendant.

4. It affirmatively appears that the defendant has not increased the prices which were in effect during the base period at any time prior to the expiration of the compliance period.

5. That it affirmatively appears that the defendant has not increased the defendant's customary percentage margin over costs of the materials with respect to any materials sold by the defendant over the margins which existed during the period May 24, 1950, to June 24, 1950, or during the period January 1, 1949, to December 31, 1949, and the plaintiff was prohibited by the provisions of Section 402 from compelling the defendant to reduce said customary percentage margins over costs of the materials.

6. That the plaintiff has failed to prove that there was any wilful violation of the regulation referred to or that the defendant failed to take practical precautions against the occurrence of such violations.

7. That it affirmatively appears that the plaintiff's complaint is based on a retroactive determination made according to a formula providing for a composite average that is impossible of application to the defendant's business; that no ceiling, no ceiling price or no maximum price has been established or determined or is establishable or determinable under said regulation and hence there is no legal

basis upon which the plaintiff can recover $35,121.90 or any part thereof.

Dated: Honolulu, T. H., this 21st day of May, 1952.

ASSOCIATED HOTELS (HAWAII), LTD., a Corporation d.b.a. NIUMALU HOTEL, Defendant.

By SMITH, WILD, BEEBE & CADES,

By /s/ J. RUSSELL CADES,
Its Attorneys.

[Endorsed]: Filed May 21, 1952.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the defendant in the above-entitled action and moves the Honorable Court in accordance with the provisions of Rule 59 of the Rules of Civil Procedure for a new trial for the following reasons (which are reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States), viz.:

1. The Court erred in assuming as a matter of fact or as a conclusion of law that the defendant "accepted a ratio from the performance in the year 1949 and that the ratio was 24.33% for cost of materials, leaving 75.67% operating expenses profits." (Oral decision, p. 1.)

2. The Court erred in assuming that the Court had no jurisdiction to consider the applicability to the facts of this case of the Act of July 31, 1951, Laws of 82nd Congress, 1st Session, Ch. 274, Pub. 95, herein referred to as the Defense Production Act amendments of 1951, which became effective at 7 o'clock p.m., Eastern Daylight Time, and at approximately 1 o'clock p.m., Hawaiian Standard Time, on July 31, 1951, which provided in part (see U.S.C. Tit. 50, App. Sec. 2102 (d) (4)), that:

> "After the enactment of this paragraph no ceiling price on any material (other than an agricultural commodity) or on any service shall become effective which is below the lower of (A) the price prevailing just before the date of issuance of the regulation or order establishing such ceiling price, or (B) the price prevailing during the period January 25, 1951, to February 24, 1951, inclusive." (Oral decision, pp. 2, 13.)

3. The Court erred in failing to find that the provisions of said Defense Production Act amendments of 1951 (see U.S.C. Tit. 50, App. Sec. 2102 (k)) prevented this Court from entering a judgment or other order by the terms of which this defendant would be denied the right as a seller of material to sell material at the customary percentage margin over the cost of materials during the period May 24, 1950, to June 24, 1950. (Oral decision, pp. 2, 13.)

4. The Court erred in assuming that the defendant was not entitled to the protection of the Congressional enactments above referred to which became effective before the close of the first compliance period, in the absence of a protest to the administrative agency. (Oral decision, pp. 2, 13.)

5. The Court erred in failing to hold that in addition to selling beverages at retail as a cabaret operator, the defendant furnished services, including entertainment, for which it made the customary charges; that all said charges were included within the total income attributed for convenience of accounting to the operation of the bars; that the cost of all such services, including the entertainment, were not included in determining the cost of the ingredients sold either in the base period or in the compliance period. (Oral decision, pp. 2, 3.)

6. The Court erred in holding that there could have been an "approximate" compliance with the regulation by the taking of monthly inventories, whereas in fact the customary mark-up for each of the long list of materials sold by the defendant gave different and widely varying margins of profit on each of the materials sold and the quantities of the various materials sold from day to day was subject likewise to wide variation. (Oral decision, p. 4.)

7. The Court erred in assuming that under CPR 11 the defendant exercised "an election" to continue under the operation thereof. (Oral decision, p. 6.)

8. The Court erred in failing to find that in order to comply with CPR 11, the defendant would have had to roll back its prices (which prices the Court found had been the same as those existing during the 1949 base period). (Oral decision, p. 8.)

9. The Court erred in ordering the entry of judgment for an amount which includes therein charges for set-ups, ice and entertainment where the cost thereof is not and cannot, pursuant to CPR 11, be taken into account either in the base or in the compliance periods. (Oral decision, pp. 10-11.)

10. The Court erred in ruling that the Court did not have jurisdiction to apply the Defense Production Act of 1950, as amended, to the facts and in finding that a judgment for an overcharge must be entered by reason of the existence of CPR 11. (Oral decision, p. 11.)

11. The Court erred in finding that notwithstanding CPR 11 as applied to the facts of the case was unworkable as well as unjust, the Court had no escape under the statute but to find for the plaintiff. (Oral decision, p. 13.)

12. The Court erred in fixing a civil penalty of $500.00 in view of the Court's finding that the defendant was sincere in his view that CPR 11 is not operable and in his view that it was unlawful and that it should not be and could not be enforced. (Oral decision, p. 14.)

13. The Court erred in concluding that the defendant's recourse, if any, was to another court. (Oral decision, p. 14.)

14. The Court erred in not ordering entry of judgment for the defendant on each of the grounds set forth in defendant's motion for entry of judgment filed at the conclusion of plaintiff's case, which said grounds are incorporated herein by reference and made a part hereof.

In accordance with Rule 2 (a) (2) of the Rules of this Court, there is attached hereto and made part hereof reasons and citations of authority in support of this motion.

Dated: Honolulu, T. H., this 18th day of June, 1952.

/s/ J. RUSSELL CADES,
Attorney for Defendant.

SMITH, WILD, BEEBE & CADES,
Of Counsel.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 23, 1952.

[Title of District Court and Cause.]

Before: Hon. J. Frank McLaughlin, Judge.

ORAL DECISION

Thank you both very much for the time, attention and guidance that you have given to the Court which has inherited this problem, or rather to a Judge of the Court. There were times during the course of the argument when, despite my own study of the problem, it would appear to some that probably justice was blind, because it certainly is hard to find your way through this mass of regulations and price control statutes. In fact, I don't think it was until this morning that, after assuming the bench, I came to any firm conviction as to what the guiding and controlling considerations were here.

I had originally been disposed to feel that the equities were all in favor of the plaintiff in that there had been a decision by this Court at the hand of Judge Metzger and that hence the movant had a hard road to hoe in convincing me that I should grant the motion for a new trial. But as I look at it now, after having the benefit of the extensive arguments that you have presented to me, I am satisfied that I not only have the authority but should in point of law grant the motion for a new trial; and having granted it then in turn in point of law grant the motion to dismiss, because in my opinion, as I see it today, despite the validity of C.P.R. 11—which I am perfectly willing to assume is valid and to agree is not within the jurisdiction

of this Court to pass upon — I am satisfied this morning that as a matter of law an action under 50 Appendix, Section 2109 (c), is a derivative action. Unless a buyer had a cause of action the United States does not inherit one. Over and beyond that the basic consideration is that, despite C.P.R. 11, which says that it sets a ceiling price, it in fact insults a person's intelligence because it doesn't. It is a price-controlling method but it does not set a ceiling price. I am not required to accept the wording of the regulation as binding upon me when common sense and intelligence tell me that it doesn't set ceiling prices.

So what C.P.R. 11 purports to do, it does not in fact do by any magic of words.

I am satisfied as a matter of law that there is no action here upon which the United States can proceed by way of attaining a derivative action entitling it possibly to treble damages. I am going to do as I have said, having granted the motion for a new trial, and it being agreed that all the evidence is before this Court in the form of this transcript and the exhibits, rule as a matter of law that under the provisions of the section I have just cited in 50 U.S. Appendix, Section 2109 (c), there has been a failure on the part of the Government in that it has not established that there was a ceiling price during the period in question which was violated, and there being no ceiling price violation there is no derivative action.

Thus the judgment for the plaintiff is impossible as a matter of law.

July 28, 1952.

/s/ ALBERT GRAIN.

[Endorsed]: Filed July 28, 1952.

[Title of District Court and Cause.]

MOTION TO VACATE RULING

Comes now the Plaintiff in the above-entitled cause and respectfully moves that this Court relieve the Plaintiff from the orders and rulings set forth in the Oral Decision of this Court, a copy of which is attached hereto, and that the Court vacate and set aside such orders and rulings.

Plaintiff further moves that the Defendant's motion for a new trial in said cause be denied and that judgment in said cause be rendered and entered in favor of the Plaintiff. The grounds upon which said motion are based are:

1. Ceiling Price Regulation No. 11 as referred to in the pleadings and evidence in said cause applies to and covers the operations of the Defendant.

2. Said Ceiling Price Regulation 11 is and must be assumed to be valid by this Court.

3. The uncontroverted and conclusive evidence shows that the Defendant did in the words of the statute (50 U.S.C.A. App. Sec. 2109 (c)) "violate

a regulation or order prescribing a ceiling or ceilings" by an "overcharge" as clearly defined in said above statute, in the amount of $11,707.30.

4. Ceiling Price Regulation 11 clearly sets forth a "ceiling or ceilings" above which the Defendant could not charge even though it may not have prescribed or defined a ceiling price for a particular drink or beverage.

5. The said regulation having set a "ceiling or ceilings" above which the Defendant could not charge and the Defendant having charged over and above said "ceiling or ceilings" to the extent of $11,707.30, the above Section 2109 (c) comes into operation and provides the Government with a valid cause of action because the regulation which set a "ceiling or ceilings" was clearly violated.

6. Ceiling Price Regulation 11 does not and does not purport to of itself give rise to a cause of action but rather only provides a "valid" ceiling. If a regulation "prescribing a ceiling or ceilings" is violated, the statute, and only the statute, creates a cause of action. Here the ceilings of a "valid" regulation were violated—hence, the Government's clear and unmistakable cause of action by virtue of said statute because "a regulation or order prescribing a ceiling or ceilings" was violated.

7. The said statute does not require that ceiling prices be violated but only that the Defendant "violate a regulation or order prescribing a 'ceiling or ceilings'," and, therefore, it is immaterial

whether the regulation sets or purports to set ceiling prices—it does set a ceiling and the ceiling was violated. Of what significance can it be that the word "prices" in the regulation may have been a misnomer? How is this Defendant in any way injured or misled by such misnomer, if it be one?

8. The Plaintiff's cause of action is not derivative, i.e., derived through, from or under a customer's right of action but is more often completely independent of a customer's right and in most instances exists where the customer has no right of action.

9. According to the above statute (50 U.S.C.A. App. Sec. 2109 (c)), the Government has the exclusive and independent right of action as distinguished from a derivative one, if the purchaser buys in the "course of trade or business" or if "the buyer * * * is not entitled for any reason to bring the action." [Underlining added.] Under such last-mentioned language one "reason" is as efficacious as another—whether it be that the buyer was in fraudulent pari delicto with the seller; whether it be a formula type of ceiling as in the instant case; whether it be that the seller has a valid, applicable counterclaim; whether it be by release and compromise; whether it be by rescission and return of the goods; or whether it be for some other reason. The language: "any reason" is all inclusive.

10. The contentions set forth in 9 above must reflect the intent of Congress for otherwise the

enforcement of price control would be exceedingly weak as any defense available to the seller against the buyer would be available against the Government. Such a theory would provide unwarranted escape by violators from the consequences of their violations, except in criminal cases where it could be proven, beyond any reasonable doubt, that the violation is "wilful."

11. Even if for the sake of argument alone, it is conceded that the Government's cause of action is but a derivative one, it is nevertheless submitted that all of the customers together could clearly bring successful action against this seller by the process of assigning their rights to a Plaintiff who would sue in their behalf for the total amount of the overcharge, namely, $11,707.30. Hence, it is submitted that the customers did have a valid cause of action against this Defendant.

Dated: Honolulu, T. H., this 1st day of August, 1952.

A. WILLIAM BARLOW,
United States Attorney;

By /s/ B. A. PERHAM, JR.,
Special Assistant United States Attorney, Attorneys for Plaintiff.

[Endorsed]: Filed August 1, 1952.

In the United States District Court
for the District of Hawaii

Civil No. 1138

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ASSOCIATED HOTELS (HAWAII), LTD., a Corporation, d.b.a. NIUMALU HOTEL,

Defendant.

JUDGMENT

This Court having before it all the evidence, motions and exhibits in the above case, and after having considered the "Motion for a New Trial" and the "Motion for Entry of Judgment," and after hearing arguments of counsel thereon, and after having rendered an oral decision wherein this Court ruled that a new trial should be granted, and wherein this Court further ruled that as a matter of law this Court should grant a dismissal of the case and the Defendant's "Motion for Entry of Judgment";

Now, Therefore, it is the judgment of this Court that the Defendant's "Motion for Entry of Judgment" be granted and that the case be dismissed with prejudice, and Judgment be rendered in favor of the Defendant and against the Plaintiff, and

that the Plaintiff recover nothing, and that the Defendant be entitled to costs as provided by law.

Dated this 29th day of August, 1952.

/s/ J. FRANK McLAUGHLIN,
District Judge.

Entered August 29, 1952.

[Endorsed]: Filed August 29, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, Plaintiff in the above-entitled action, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the oral decision rendered in this action on July 22, 1952, and from the judgment entered herein August 29, 1952.

Dated: Honolulu, T. H., this 19th day of September, 1952.

A. WILLIAM BARLOW,
United States Attorney,
District of Hawaii;

By /s/ B. A. PERHAM, JR.,
Special Assistant United States Attorney, Attorneys for the Plaintiff.

[Endorsed]: Filed September 19, 1952.

[Title of District Court and Cause.]

ORDER EXTENDING THE TIME FOR THE APPELLANT TO FILE THE RECORD ON APPEAL AND TO DOCKET THE APPEAL

A Notice of Appeal to the United States Court of Appeals for the Ninth Circuit having been filed on the 19th day of September, 1952, it is hereby ordered that the United States of America, the Plaintiff in the above-entitled action, shall have up to and including 17th day of December, 1952, within which to file the record on appeal and docket the appeal with the United States Court of Appeals for the Ninth Circuit.

Dated: Honolulu, T. H., this 19th day of September, 1952.

/s/ J. FRANK McLAUGHLIN,
Judge, United States District Court for the District of Hawaii.

[Endorsed]: Filed September 19, 1952.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by each of the parties hereto that the Plaintiff in the above-entitled action shall have up to and including the 15th day of February, 1953, within which to file the record on appeal and docket the appeal of the

above case with the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: Honolulu, T. H., this 10th day of December, 1952.

By /s/ BENJAMIN A. PERHAM, JR.,
Special Assistant United States Attorney, Attorney for Plaintiff.

By /s/ J. RUSSELL CADES, of
SMITH, WILD, BEEBE & CADES,
Attorneys for Defendant.

Approved:

/s/ J. FRANK McLAUGHLIN,
Judge, United States District Court for the District of Hawaii.

[Endorsed]: Filed December 10, 1952.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT, TO TRANSCRIPT OF RECORD ON APPEAL

United States of America,
District of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing record on appeal in the above-entitled cause, numbered from page 1 to page 511, consists of a statement of the names

and addresses of the attorneys of record, and of the various pleadings, transcript of proceedings, and exhibits as hereinbelow listed and indicated:

Originals.

Complaint and Summons.

Motion and Notice of Motion to Dismiss and for Summary Judgment and Affidavit, Memorandum of Authorities.

More Definite Statement and Bill of Particulars.

Answer.

Amendment to Complaint.

Motion for Entry of Judgment.

Motion for New Trial.

Oral Decision.

Motion to Vacate Ruling.

Judgment.

Notice of Appeal.

Order Extending the Time for the Appellant to File the Record on Appeal and to Docket the Appeal.

Stipulation.

Designation of Contents of Record on Appeal.

Transcript of Proceedings.

Plaintiff's Exhibit No. 1.

Plaintiff's Exhibit No. 2.

Plaintiff's Exhibits Nos. 3-A and 3-B.

Plaintiff's Exhibit No. 4.

Plaintiff's Exhibit No. 5.

Plaintiff's Exhibit No. 6.

Plaintiff's Exhibit No. 7.

Plaintiff's Exhibit No. 8-A.

Plaintiff's Exhibit No. 8-B.
Plaintiff's Exhibit No. 8-C.
Plaintiff's Exhibit No. 8-D.
Plaintiff's Exhibit No. 8-E.
Defendant's Exhibit "A."
Defendant's Exhibit "B."
Defendant's Exhibit "C."
Defendant's Exhibit "D."

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 7th day of January, A.D. 1953.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District Court, District of Hawaii.

[Endorsed]: No. 13684. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Associated Hotels (Hawaii), Ltd., a Corporation, d.b.a. Niumalu Hotel, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Hawaii.

Filed January 10, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
Civil Action

District Court File Number 1138

UNITED STATES OF AMERICA,
Appellant (Plaintiff Below),

vs.

ASSOCIATED HOTELS (HAWAII), LTD., a Corporation, d.b.a. NIUMALU HOTEL,
Appellee (Defendant Below).

STATEMENT OF POINTS ON WHICH APPELLANT RELIES AND DESIGNATION OF CONTENTS OF RECORD ON APPEAL

The Appellant in the above case having appealed from a judgment therein, and pursuant to Rule 19 (6) of the United States Court of Appeals for the Ninth Circuit, hereby presents the "Statement of Points on Which He Will Rely on Appeal," as follows, to wit:

1. The District Court erred in granting the Defendant's motion for a new trial.

2. The District Court exceeded its jurisdiction insofar as it made findings affecting the validity of a price regulation.

3. The District Court erred in finding that the Government's cause of action under Section 409 (c) of the Defense Production Act is a "derivative action."

4. The District Court erred in finding that Ceiling Price Regulation 11 does not give a buyer a cause of action for its violation.

5. The District Court erred in finding that Ceiling Price Regulation 11 does not establish price ceilings.

6. The District Court erred in finding that it was not bound by Ceiling Price Regulation 11.

7. The District Court erred in finding that unless a buyer had a cause of action, the Government does not have one.

Pursuant to Rule 19 (6) of the United States Court of Appeals for the Ninth Circuit, the Appellant hereby Designates the Parts of the Record which he deems necessary for the consideration of said Points aforementioned, as follows, to wit:

1. The "Complaint."
2. Plaintiff's "More Definite Statement and Bill of Particulars."
3. Defendant's "Motion to Dismiss and for Summary Judgment," and the Court's decision concerning said motion.
4. Defendant's "Answer."
5. "Transcript of Proceedings Before Honorable Delbert E. Metzger, Judge."
6. Defendant's "Motion for Entry Into Judgment," and Court's decision concerning said Motion.
7. "Oral Decision From the Bench at Conclusion of Argument; Honorable Delbert E. Metzger, Judge."

8. Defendant's "Motion for a New Trial."

9. "Oral Decision" by Honorable J. Frank McLaughlin, Judge.

10. Plaintiff's "Motion to Vacate Ruling."

11. "Transcript of Proceedings Before Honorable J. Frank McLaughlin, Judge," on August 6, 1952.

12. "Judgment" of August 29, 1952.

13. Plaintiff's "Notice of Appeal" of September 19, 1952.

14. "Order Extending the Time for the Appellant to File the Record on Appeal and to Docket the Appeal," of September 19, 1952.

15. "Stipulation" of December 10, 1952.

Dated: Honolulu, T. H., this 31st day of December, 1952.

UNITED STATES OF AMERICA,
Appellant.

By /s/ BENJAMIN A. PERHAM, JR.,
Special Assistant United States
Attorney.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 10, 1953.

[Title of Court of Appeals and Cause.]

Present: Honorable William Denman,
Chief Judge, Presiding;

Honorable Homer T. Bone,
Circuit Judge;

Honorable Walter L. Pope,
Circuit Judge.

ORDER ON MOTION RE PRINTED TRANSCRIPT

Upon consideration of the motion of the United States of America that the reporter's transcript of testimony and exhibits introduced in evidence need not be included within the printed transcript, but may be referred to by the court in their original form, and of the response of appellee thereto,

It Is Ordered that leave be, and hereby is, granted to appellant to prosecute the appeal herein on typewritten transcript of testimony provided that four copies of the reporter's transcript are furnished to the court, and a copy furnished to counsel for appellee if they have no copy presently.

It Is Further Ordered that the exhibits will be considered by the court in their original form, and that they will be made available by the Clerk of the Court to the parties in the offices of the Clerk in the District Court of Hawaii, or Supreme Court of the United States.